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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 85-1842

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

DAN COVERT,

Petitioner

versus

COMMONWEALTH OF KENTUCKY,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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COUNSEL FOR RESPONDENT

July 1986.

27pp

QUESTION PRESENTED

Whether the trial judge violated the petitioner's rights under the Sixth Amendment Confrontation Clause when, in a rape trial where consent was at issue, he excluded evidence of prior sexual relations between the petitioner and one of the alleged rape victims?

LIST OF PARTIES

Dan Covert

Commonwealth of Kentucky

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Respondent, the Commonwealth of Kentucky, respectfully urges the Court to deny certiorari for the following reasons.

OPINION BELOW

The unreported Opinion of the Supreme Court of Kentucky is reproduced in the appendix to Petitioner's Brief.

JURISDICTION

The judgment of the Supreme Court of Kentucky was entered on October 31, 1985. Rehearing was denied on February 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case is hereby accepted, subject to the additional facts detailed hereinafter.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE WHICH PETITIONER RAISES HERE WAS NEVER PRESENTED TO THE STATE APPELLATE COURT FOR REVIEW.

In Smith v. Murray, ___U.S.___. 54 U.S.L.W. 4833 (Decided June 26, 1986), this Court declined to address the merits of a claim which had not been presented for review by the Virginia Supreme Court on direct appeal of a capital sentence.

Here, Petitioner is seeking review of a claim which was preserved at trial but abandoned on direct appeal to the Kentucky Supreme Court. His argument,

that the exclusion of certain evidence violated the Sixth Amendment Confrontation Clause, has never been presented to a Kentucky court of review. The fact that the Kentucky Supreme Court allowed Petitioner to file two appellant's briefs, authored by different attorneys, suggests that such an omission was the product of professional judgment rather than oversight or incompetence. Listed in the appendix to this brief are the errors which were assigned below. Denial of Confrontation concerning Donna Wheeler is not among them, and at no point in the text of his briefs below is Kentucky's Rape Shield Statute even mentioned. The petition for writ of certiorari should be summarily dismissed. Hill v. California, 401 U.S. 797, 805, 91 S.Ct. 1106, 1111, 28 L.Ed.2d 484, 490-491 (1971).

II.

PETITIONER JUMPED BAIL PRIOR TO SEEKING CERTIORARI AND REMAINED AT LARGE UNTIL AFTERWARDS, WHEN HE WAS APPREHENDED BY AUTHORITIES IN GEORGIA.

The Kentucky trial court that sentenced Petitioner also granted him bail pending appeal.

After the Kentucky Supreme Court denied his petition to rehear the appeal, Petitioner was notified that he must appear before the trial court to show cause why service of sentence should not commence. Petitioner failed to appear for the February 28, 1986 hearing, which resulted in his $100,000 bond being forfeited. He remained a fugitive from justice until after his petition for writ of certiorari was filed, as shown by a June 26, 1986 letter from Petitioner's counsel to the Clerk of this Court.

In Molinaro v. New Jersey, 396 U.S. 365, 366, 90 S.Ct. 498, 498-499, 24 L.Ed.2d 586, 588 (1970) the Court held:

> While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the court for determination of his claims.

Respondent respectfully submits that the recent capture of Petitioner should not exempt his petition from summary dismissal. Estelle v. Dorrough, 420 U.S. 534, 95 S.Ct. 1173, 43 L.Ed.2d 377 (1975).

III.

THERE IS NO FACTUAL BASIS FOR PETITIONER'S CLAIM.

The appendix to Petitioner's brief purports to include a complete transcript of the in-chambers discussion and exclusion of evidence showing prior sexual relations between Petitioner and the prosecutrix, Donna Wheeler. At first blush, the trial court's ruling appears to violate the Confrontation Clause of the Sixth Amendment in addition to the Kentucky Rape Shield Statute, KRS 510.145(3).

Closer inspection of the trial record, however, discloses that the matter was resumed in chambers before Donna Wheeler testified on cross examination. Kentucky law requires that in order to preserve the exclusion of evidence for appellate review, the proponent must make an avowal of the evidence he otherwise would have introduced. RCr 9.52, Kentucky Rules of Criminal Procedure; Queen v. Commonwealth, Ky., 551 S.W.2d 239, 241 (1977).

Petitioner's counsel made an avowal immediately following the direct examination of Donna Wheeler before the jury. The transcript of Petitioner's avowal is reproduced in the appendix to this brief. As the Court will see, Petitioner offered no avowal testimony whatsoever as would suggest any relations, sexual or otherwise, occurring between himself and the prosecutrix prior to the July 28 attack alleged in the indictment. The only evidence offered concerning any prior sexual relations was that between Donna Wheeler and a Cincinnati Reds baseball player, as the occasion on which she had lost her virginity. The trial judge ruled that without identifying the baseball player, Petitioner could introduce evidence that the prosecutrix previously had lost her virginity.

The only other evidence Petitioner offered on avowal was that Donna Wheeler had engaged in sex with him after the July 28 incident, which the trial judge ruled was also admissible. KRS 510.145 does not address subsequent sexual activity, only prior conduct.

The avowal testimony that Donna Wheeler previously had dated a University of Kentucky basketball player, without having sexual relations, was clearly irrelevant and excluded accordingly.

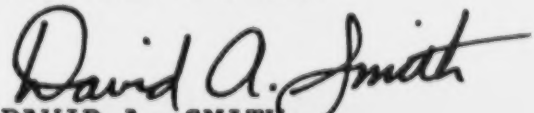
In short, Petitioner ultimately was permitted to introduce all the evidence he offered, save that concerning a nonsexual relationship between the prosecutrix and a college basketball player.

CONCLUSION

For all the reasons set out herein above the petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID L. ARMSTRONG
ATTORNEY GENERAL



DAVID A. SMITH
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

As a member of the Bar of the United States Supreme Court, the undersigned hereby certifies that on the 29th day of July, 1986, three copies of the foregoing Response to Petition for Writ of Certiorari were mailed first-class, postage prepaid, to Hon. Albert M. Pearson, III, School of Law, University of Georgia, Athens, Georgia 30602; and to Hon. Clifford H. Hardwick, Legal Arts Building, 6044 Norcross-Tucker Road, Norcross, Georgia 30093.

David A. Smith
Assistant Attorney General

APPENDIX

Kentucky
Fayette Circuit Court
Criminal Branch
Fourth Division
Transcript of Evidence and Proceedings
Trial, August 16, 1984

Pages 89-96

* * * * *

WHEREUPON the following was held in chambers outside the presence of the jury with Miss Donna Wheeler being present:

* * * * *

THE COURT: So you know what's going on, I previously made a ruling that certain evidence would not be admissible before the jury, but they have a right to get that evidence in to the record that they have offered for appeal purposes. In case I'm wrong and they reverse the case, they have an opportunity to put that in the record outside the presence of the jury. And that's what we're doing now.

MS. WHEELER: Yes, sir.

THE COURT: And you're still under oath. Okay.

* * * * *

BY MR. LUNDY:

Q. Miss Wheeler, do you recall the first day that you went to the apartment of Danny Covert's?

A. It was the first day that I met Mr. Covert.

Q. What date was that?

A. Approximately the 28th.

Q. Twenty-eighth.

A. Of July.

Q. 1983?

A. Yes, sir.

Q. Do you recall what day of the week it was?

A. No, sir, I know it was a weekday but not exactly the day.

Q. And you had told the Court here that that was the date that you were vomiting, throwing up and he had intercourse with you?

A. Yes, sir.

Q. Once or twice?

A. I think twice because it was when I woke up to --

Q. Now, did you go to his house on any other occasions?

A. I went to his house once after that.

Q. Okay. What date was that on?

A. Sir, it was --

Q. Well, how many days later?

A. Maybe five days later. He kept calling my apartment and --

Q. Now let me ask you this. During your conversations with him and first time you were in, had he indicated to you that he would give you $10,000 and also let you have a Ferrari automobile?

A. Yes, he did.

Q. That was worth about $85,000?

A. Yes, sir.

Q. Now, when you went back there the second time did you ask him for that $10,000 and tht 85 -- $85,000 Ferrari?

A. I didn't ask him.

Q. Did you discuss --

THE COURT: Hold it just a minute. All this would be admissible. I mean we're not putting in this by avowal because I ruled that all this is admissible and we're wasting time.

MR. LUNDY: Let me ask her a few more questions.

Q. Did you -- did you have intercourse with him or did he have intercourse with you the second time that you were there?

A. No, sir.

Q. Did he try to?

A. He wanted to. He asked me to -- he said that he would give me that money and give me a car that he already had the car and he told me that it was blue -- bluish white and he said that he already had purchased it and that he had to go to Chicago to get it. He said that -- he said I tell you what, I've already got it for you. And he said --

THE COURT: That's okay. All that's admissible. We're going to have to hear that in there.

Q. Let me ask you this. During the first time you went to his apartment did you tell him about how you had lost your virginity to someone who was a baseball player?

A. Baseball player.

MR. TURNER: Reds.

Q. Someone who played for the Reds?

A. Yes.

Q. You told him that?

A. (Witness nods head affirmatively) because he asked me if -- he asked me if I had ever had sex and I said just once and --

Q. Did you also tell him that you were - that you engaged in sexual activities with University of Kentucky basketball players?

A. No, I did not. I told him that I had dated a basketball player but that we had never had sexual activity.

Q. Did you tell him that you and this basketball player that you only engaged in oral sex because he respected you too much, you respected him too much?

A. No.

Q. You did not tell him that?

A. No, sir, I did not tell him that.

MR. LUNDY: Well, I guess, Judge, anything else I want to ask her probably confidential because what I'll ask her would be after July 18. I'm -- I assume that under your ruling I can ask her about any other times they -- he may have said that they had intercourse.

THE COURT: After this happened, I would think so.

MR. LUNDY: After the 28th.

MR. BOUVIER: I have no problem with that. It's only I don't want this -- looks to me like it's turning into a vast way of saying after the fact did he tell you before the fact that he had sex with Reds ballplayer.

THE COURT: I'm not saying that's admissible. I said that wasn't admissible.

MR. LUNDY: That's --

THE COURT: That's not admissible, basketball player is not admissible, but any contact she had with Covert after this incident happened is admissible.

MS. WHEELER: I did not have sexual intercourse with him after this happened.

THE COURT: He can ask you that in front of jury, but he can't ask you in front of jury about the basketball player or the baseball player, okay.

MR. LUNDY: Judge, let me get a clarification on another thing here. Would it be permissible for me to simply ask her to relate the conversation that which she's told, kind of conversation she had with Covert the night that she was there? Can I go into these things about whether or not he asked her if she had sex before, if she lost her virginity and not prove it, you know,

extraneous, but just as a part of conversation he had with him - she had with him? Now bringing somebody in and saying she left about five years ago, a week is one thing.

THE COURT: I think you can ask if he asked her if she'd loss her virginity but not go any further than that.

MR. LUNDY: Which baseball player.

MR. TURNER: Without losing virginity did you all talk about sex while you were there.

THE COURT: Something like that -- like that would be admissible. That's not a prior sexual act.

MR. TURNER: Judge, the basketball players came afterwards.

THE COURT: Well, I'm not going to allow that.

MR. TURNER: Might be interesting.

MR. BOUVIER: I have no objection to the question he just said did you all talk

about sex, but if he -- again if it's to be used as a lever to get back at which you said.

THE COURT: If she, if for instance, I think I can -- he can ask her did you tell him when you lost your virginity or --

MR. LUNDY: That's basically what I want to ask her.

THE COURT: Or if you lost your virginity, did you all have that conversation. I think he can ask her that.

MR. BOUVIER: Can I say one thing while we're here? I don't know if it'll come up or not but with Mr. Covert's anything's possible. This morning when I arrived I had several witnesses out here who I hadn't seen in six months and wouldn't immediately recognize because I only talked to them on the phone. I was looking for the people in the hall, and I saw too young women who I did not immediately recognize although they

looked familiar. I went up to them and said are you witnesses supoenaed in this case. And they both said no, we're jurors. They didn't have their juror buttons on at the time. I said sorry and backed away and said nothing else. But Mr. Covert was nearby and was, you know, glaring at me and I assumed that, you know, it may come up at some time.

MR. LUNDY: He never said to me about it. I make no point --

MR. TURNER: He told me about it and I said forget it, that happens.

* * * * *

WHEREUPON this concludes the session held in chambers at this time.

* * * * *

THE COURT: Okay, counsel for Mr. Covert may cross-examine.

MR. LUNDY: Thank you, Your Honor.

* * * * *

ERRORS ASSIGNED TO THE KENTUCKY SUPREME COURT

Appellant's Brief
Honorable John S. Turner,
Attorney at Law.

I.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENIED THE APPELLANT DUE PROCESS OF LAW WHEN IT OVERRULED APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL ON THE SOLICITATION TO PROSTITUTION CHARGES SINCE THE COMMONWEALTH FAILED TO ESTABLISH VENUE.

II.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENIED APPELLANT DUE PROCESS OF LAW WHEN IT OVERRULED APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL SINCE APPELLANT'S CONVICTION FOR RAPE IN THE FIRST DEGREE WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

III.

THE COURT BELOW ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE AND DENIED APPELLANT DUE PROCESS OF LAW WHEN IT OVERRULED APPELLANT'S MOTION FOR A DIRECTED VERDICT OF ACQUITTAL SINCE APPELLANT'S CONVICTION FOR RAPE IN THE THIRD DEGREE AND SODOMY IN THE THIRD DEGREE, OF LISA ROBERTS, WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

* * * * *

Appellant's Supplemental Brief
Honorable David M. Andrews,
Honorable Margaret H. Kannensohn
Attorneys at Law

I.
THE TRIAL COURT SHOULD HAVE SUSTAINED COVERT'S MOTION FOR A DIRECTED VERDICT ON RAPE FIRST.

II.
COVERT WAS PREJUDICED BY THE REFUSAL TO SEVER THE THIRTY-ONE CHARGES.

III.
AS AN AGENT OF THE COMMONWEALTH THE EVIDENCE PATRICIA CRUTCHER OBTAINED WAS INADMISSIBLE.

IV.
COVERT'S RIGHT OF CONFRONTATION WAS DENIED BECAUSE THE COURT DID NOT SUPPRESS THE SUITCASE WHEN PATRICIA CRUTCHER TOOK THE FIFTH AMENDMENT.

V.
THE CUMULATIVE EFFECT OF THESE ERRORS DENIED COVERT HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

VI.
THE EVIDENCE AS TO THE MENTAL INCAPACITY OF LISA ROBERTS WAS INSUFFICIENT AND THE TRIAL COURT ERRED BY NOT DIRECTING A VERDICT OF ACQUITTAL AS TO RAPE THIRD AND SODOMY THIRD.

VII.

SEXUAL MISCONDUCT IS NOT A LESSER INCLUDED OF RAPE AND SODOMY.

VIII.

THE TRIAL COURT ERRED BY FAILING TO GRANT A DIRECTED VERDICT OF ACQUITTAL ON ALL COUNTS OF SOLICITATION OF PROSTITUTION FOR FAILURE OF PROOF AS TO VENUE.

IX.

THE COMMONWEALTH FAILED TO PROVE THE MISDEMEANDOR OFFENSES OCCURRED WITHIN THE STATUTE OF LIMITATIONS.

X.

THE TRIAL COURT ERRED BY OVERRULING DEFENSE MOTIONS FOR FAILURE TO IDENTIFY THE DEFENDANT ON TRIAL.